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No. 90-1937

In The

Supreme Court of the United States

October Term, 1991

WILLIAM F. PATY, Director, Department of Land and Natural Resources, State of Hawaii,

Petitioner,

vs.

MERVIN NAPEAHI, individually and on behalf of all those similarly situated,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

SUMMARY OF ARGUMENT

Respondent's opposition demonstrates more clearly than ever that the Ninth Circuit's unprecedented intrusion into Hawaii's management of its trust lands should not be permitted to stand.

ARGUMENT

A. Certiorari Should Be Granted to Review the Jurisdictional Underpinnings of the Ninth Circuit's Expansive Invitation to Equity Suits Seeking to Manage Hawaii's Public Trust Lands.

Respondent reluctantly agrees Petitioner's Article III and Eleventh Amendment challenges to the judgment below are

before the Court, *see* Resp. Br. at 29[1], but nonetheless claims these issues are not worthy of this Court's review. Thus, Respondent urges, as to Article III, that review should be denied because "Mr. Napeahi can show injury fairly traceable to Petitioner's conduct" (Resp. Br. 14), and "there is no conflict between the Ninth Circuit's ruling and this court's previous pronouncements on Article III standing, prosecutorial discretion, federalism, or separation of powers" (*id.* at 20). As to the Eleventh Amendment, Respondent claims (a) the issue is premature (*id.* at 23, 27); and (b) meritless because the relief sought does adjudicate the State's title (*id.* at 28), or State law (*id.* at 28-29), or constitute a "one time restoration" (*id.* at 24-28). None of these arguments provide a basis for denying review.

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[1] Respondent argues, inconsistently, that the Eleventh Amendment argument comes both too soon and too late. Neither is true. As to the latter, see *Alabama v. Pugh*, 438 U.S. 781, 782 n.1 (1978); indeed, the Eleventh Amendment was both pled and moved upon, even in the trial court (*see* Pet. App. 22a). Petitioner's failure to raise the Eleventh Amendment defense at the court of appeals stage is not a bar here. *Cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *id.* at 165 & n.49 (Stevens, J., dissenting). Nor is there a full appellate forfeiture, in *this* Court, of sovereign immunity, as the issue is squarely raised in the Petition. *See Sosna v. Iowa*, 419 U.S. 393, 396 n.3 (1975). Finally, although "a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts," *Pennhurst II*, *supra*, 465 U.S. at 99 n.9, and hence it is of no relevance what may constitute a waiver of immunity in *state* court, Respondent is wrong (Resp. Br. 22) in asserting that in Hawaii immunity may not be raised for the first time on a direct appeal. *Compare Figueroa v. State*, 61 Haw. 369, 381, 604 P.2d 1198, 1205 (1979) (sovereign immunity "may be raised at any time"), *with Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 333 n.9, 640 P.2d 1161, 1165 (1982) (immunity cannot be raised in a collateral attack when the time to appeal has expired (citing rulings of this Court in support)).

1. The Ninth Circuit's Allowance of Standing Here is Plainly at Odds With This Court's Precedents, and at the Very Least Presents Issues Meriting this Court's Review.

Respondent claims that standing exists because "a specific allocation of funds to a native Hawaiian is affected" and, allegedly, due to the actions of the Director of Land and Natural Resources, "one like Mr. Napeahi can suffer a specific loss of access to, and the actual use of, important natural resource areas on submerged lands" (Resp. Br. at 14).

These claims, however, are not only factually untrue, but are legally untenable. *See, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984), *quoted*, Pet. at 18. Respondent is at least quadruply wrong in claiming that Article III standing exists.

First, while Respondent claims that twenty per cent of the *revenues* from Hawaii's public trust land, as defined by Ch. 304, 1990 Haw. Sess. L. 947 *et seq.* (Pet. App. 118-31), are to be channeled to the Office of Hawaiian Affairs, there is nothing which legally requires that there *be* revenues from the trust lands. There can be no claim that native Hawaiians, even via the Office of Hawaiian Affairs, *see id.*, have any claim to funds from public trust lands that are wrongly diverted to private hands. Such lands, even if recovered, need not be made profitable, or, even, revenue generating at all. Thus, even if the District Court were to declare the shoreline certification in this case unlawful, and enjoin its "recovery," that relief would not likely redress *any* monetary injury Plaintiffs suffer.

Second, even if the "recovery" of the lands would redound to the benefit of the Office of Hawaiian Affairs, that would plainly *not* give rise to any Article III "controversy." OHA, like any legislative entity, is free rationally to choose which projects benefitting its constituents, *i.e.*, in the case of projects funded with 5(f) revenues, "native Hawaiians," to fund. *See* Pet. App. 126 (H.R.S. § 10-13.5 (1990) (5(f) money "shall be expended by the office for the betterment of the conditions of native Hawaiians" generally, leaving to OHA's discretion which projects to fund). OHA has no duty whatever

to fund any project benefitting Mr. Napeahi. Neither Respondent nor the Ninth Circuit below have any good answer to this.

Indeed, it is for this precise reason that this Petition squarely presents the jurisdictional obstacle identified by the four-Justice opinion in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), and why, in light of the general standing precepts stated in *Allen v. Wright*, 468 U.S. 737 (1984), and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), the judgment below is plainly wrong. There is literally no difference, for Article III purposes, between this case and one in which, say, a private citizen sues to enjoin the Internal Revenue Service's failure to collect all the revenue that is due on the ground that that person is "injured" by the Government's lack of resources to spend on social welfare (or other) programs the federal plaintiff desires. Such suits requiring the federal Courts' speculation as to legislative choice have never been permitted. Accordingly, certiorari should issue.

Third, even if this Court were to tolerate speculative predictions of future legislative action as a basis for entertaining injunctive suits, that would not overcome the independent interference with prosecutorial discretion entailed by the judgment below. *See* Pet. at 21. The claim that "the issue is not centered on the adequacy or level of benefits awarded by the Office of Hawaiian Affairs to its Native Hawaiian beneficiaries, or the management details of Petitioner's department" (Resp. Br. at 19) only highlights that this suit seeks an impermissible federal directive to state officials to prosecute. *See* Resp. Br. at 27 (relief sought is money from the Waikoloa Beach Resort, gained through prosecutive demands by Petitioner).

Fourth, Respondent's claim is premised upon even further speculation as to whether any relief would be forthcoming from the state *courts* in a suit against the resort. *Compare Whitmore v. Arkansas*, 110 S. Ct. 1717, 1725 (1990). Under Hawaii law, for example, the Waikoloa would have colorable claims of estoppel against any effort to recover the beachfront which the hotel's owners and predecessors in interest spent large sums to develop. *See, e.g., Robinson v. Ariyoshi*, 65

Haw. 641, 667, 658 P.2d 287, 305 (1982) (quoting *Filipo v. Chang*, 62 Haw. 626, 628 P.2d 295 (1980)). Standing cannot exist in this case without a usurpation, therefore, of critical functions not only of the legislature and executive but also the state judiciary.[2]

There is plainly no Article III controversy here, and the Court should grant the petition for certiorari and so hold.

2. The Ninth Circuit's Remand Clearly Conflicts With This Court's Elaboration of Eleventh Amendment Constraints.

There is no merit to Respondent's effort to evade review of the severe Eleventh Amendment defects in the judgment below.

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[2] While Respondent seeks to avoid this analysis by claiming that the lands in issue are "submerged lands upon which native Hawaiians like Mr. Napeahi continue to depend" (Resp. Br. at 18), this is not the basis of the judgment below, and it is not clear that Respondent ever perfected this basis for standing in the lower courts. Accordingly, the Court should not consider this basis for jurisdiction. *See Bender v. Williamsport Area School District*, 475 U.S. 734, 741-43 (1985); *cf. Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986). In any case, this alternative claim does not overcome the argument stated in the Petition, for the same reasons stated above. Indeed, the State could build its own limited access beach that would inflict the same injury suffered now, even if the Attorney General could be compelled to sue, and the Waikoloa could be compelled to give back the beach. Moreover, Respondent does not even claim that he wishes the beach restored to the State. *See* Resp. Br. at 27. Finally, there is nothing in the record to show that Mr. Napeahi's interest in the land at issue is any different than any other person in Hawaii (or the nation, for that matter), who wishes, even for the best of motives, to frustrate, the development of the coast of west Hawaii. *Compare Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990).

Respondent also argues that the Petition "exaggerates the impact" of the decision below (Resp. Br. at 9-11), but this asserted basis for denying review is belied, not only by the brief of the amici States, but also by Respondent's own argument confessing that with respect to its trust lands Hawaii has perhaps the broadest discretion of the States. *See* Resp. Br. 11 n.17, 17 (quoting *Price v. Hawaii*, 921 F.2d 950 (9th Cir. 1990)).

First, the issue is hardly premature, given the "special obligation" this Court has to assess the jurisdiction "of the lower courts in a cause under review." *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). Moreover, even if it were appropriate in some cases to allow development of the record upon an Eleventh Amendment defense, such development is not needed here. *Cf. Papasan v. Allain*, 478 U.S. 265 (1986) (assessing "breach of trust" claim on a Rule 12 motion record).

Second, Respondent has no real answer to *Papasan*'s bar on "breach of trust" claims, as his effort to water down the relief sought demonstrates (*see* Resp. Br. at 27). Even if it is proper under Article III to ask the District Court to instruct the Director of Lands to pray for compensation from the Waikoloa, nothing in *Papasan* in any way limits the ban on relief amounting to "a substitute for the return of the trust corpus" in the way Respondent suggests. Respondent has here no more of a "continuing violation" than did the beneficiaries of the trust lands at issue in *Papasan* on their breach of trust claim. See 478 U.S. at 297-98 & n.3 (Powell, J.). The bar on retrospective relief does not permit the federal courts to render the States collection agents vis a vis past overpayments any more than it permits federal judicial decrees remedying past underpayments. *See Edelman v. Jordan*, 415 U.S. 651 (1974).[3]

Third, Respondent does not answer the independent claim that the litigation below constitutes an impermissible review of the State's claimed title (Pet. at 23). Even if the issue below is one of federal law, the bar of *Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 700 (1982), is not

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[3] Respondent contends he would at the very least be entitled to "an injunction to prevent Petitioner from further recertification of shorelines in the State of Hawaii which result in the abandonment of ceded lands to private interests without public hearing or notice, compensation, or explanation" (Resp. Br. at 27). Aside from the fact that such relief is nowhere contemplated in Section 5(f), or in any included state statute, such claims are independently barred at the least by the standing precepts of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

limited to cases where title is founded upon state law. Of course, since it is a State's prerogative to recognize private rights in public trust lands as it "see[s] fit," *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1984), this case is truly one where the bar on the litigation of state law qua state law, *see Pennhurst II, supra*, is fully in play.

Review should be granted on the Eleventh Amendment claims.

B. Certiorari Should Be Granted to Review the Court of Appeals' Expansive Reading of 42 U.S.C. § 1983.

Respondent offers virtually no reason at all to justify, as correct, the Ninth Circuit's determination that 42 U.S.C. § 1983 can be used to enforce Hawaii's Admission Act in this context. Respondents' sole argument on this front is that the issue is waived.

Respondent's concerns are misplaced for several reasons.

First, even Respondent must concede that this Court may review the judgment below for determination whether this case "arises under" federal law for purposes of subject matter jurisdiction. *See* Resp. Br. at 31-34. As the Petition demonstrates, both Respondent and the lower court have erred to the extent they assume that the issue of the Waikaloa's title is a question of *federal* law. For even if the submerged lands at issue here were at one time owned by the State, "States have the authority to define the limits of the lands held in public trust and to recognize rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988); *see also* Pet. at 23-24. Nothing in *State v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977), in any way refutes the contention that this suit does not arise under federal law. Indeed, *Zimring's* analysis of where lava flows "vest" belies any suggestion that the title question below turns on federal law. *See* 58 Haw. at 119-21, 566 P.2d at 734-35. Accordingly, review is proper.

Second, even if the Court must determine whether § 1983 properly was invoked below in order to reverse the judgment, that question is properly before the Court. Fairly read, the

Ninth Circuit's judgment in this case "passed upon" the issue of § 1983 enforceability, preserving the issue for review. Indeed, the Ninth Circuit's opinions in this area, both in this case, and generally, make clear that the Court treats "standing" to sue as encompassing the right to invoke § 1983. *See, e.g., Price v. Hawaii*, 939 F.2d 702, Slip Op. at 10667 (9th Cir. Aug. 8, 1991) (discussing under the heading of "standing" the holding that "an action under 42 U.S.C. § 1983 is proper" to enforce § 5(f)); *Price v. Akaka*, 928 F.824, 827 (9th Cir. 1991) (addressing availability of § 1983 under subject matter jurisdiction); *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990) (plaintiffs "have standing to bring suit" (citing *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981)). The panel here invoked this line of authority (*see* Pet. App. 7a & n.2), and the issue is here. *See Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991).

Third, the entire purpose of the "pressed or passed upon below" rule is to assure that the lower courts have the full opportunity to develop their view of an issue before that issue is brought here. In this case, as Respondent himself argues, any further litigation of the § 1983 question in the Ninth Circuit has been flatly foreclosed by *Price v. Hawaii*, 939 F.2d 702 (9th Cir. as amended August 8, 1991), *quoted at* Resp. Br. at 31-32 & n.25. No purpose would be served by denying review on this point. No fact issue is relevant. Indeed, the issue "goes to the validity of the . . . proceeding that is the basis for this litigation," *Freytag v. Commissioner*, 111 S. Ct. 2631, 2639 (1991), and presents a question "antecedent to [the merits] and ultimately dispositive of the present dispute," *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990). These factors cut strongly in favor of review. Indeed, other than conclusorily citing the Ninth Circuit cases of which review is sought, Respondent offers no defense of the lower courts' deployment of 42 U.S.C. § 1983 to enforce § 5(f). *Cf.* this Court's Rule 15.1.

For all these reasons certiorari should be granted, or at least the Court should hold the petition pending decision in *Suter v. Artist M.*, No. 90-1488 (cert. granted March 13, 1990).

C. Review Should Be Granted In Light of the Substantial Grounds for Abstention Below.

Respondent's argument that abstention has been waived and is improper in any event (Resp. Br. 30 & n.23), does not hold up. *See* Pet. at 29. This Court, as to *Pullman* abstention, *see Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), has made clear that it will not "defer to the wishes of the parties concerning adjudication," *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n.11 (1977). Likewise, the settled rule is that *Burford* abstention, as well, may be raised for the first time on appeal. *See Grimes v. Corwn Life Ins. Co.*, 857 F.2d 699, 706-07 (10th Cir. 1988). Moreover, abstention *was* raised in District Court. *See Ohio Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986). Respondent's claim that state law is not at the heart of this case is not only wrong, but an about-face from the position taken below. In the Ninth Circuit, Napeahi, indeed, moved for certification of questions to the Supreme Court of Hawaii. *See* Order, No. 87-1844 (9th Cir. Mar. 21, 1988). While Petitioner, then, did not believe the state law issues at all unclear, no party then disputed the potential applicability of certification under H.R.A.P. 13. Abstention is proper, and for this added reason, so is review here.[4]

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[4] Respondent's argument that *Burford* abstention is inapt because of the lack of administrative rules (Resp. Br. at 30 n.25) has no bearing on whether a proceeding under the Administrative Procedure Act, HRS Ch. 91, could have tested the claims here. There is no "ongoing proceeding" requirement for *Burford* abstention. *Burford v. Sun Oil Co.*, 319 U.S. 315, 327-34 (1943).

CONCLUSION

For the reasons above, in the petition, and in the brief of the States of Alabama, Alaska, Idaho, Indiana, Missouri, Nevada, Oklahoma, Oregon, and Wyoming, the petition for certiorari and the relief prayed for therein should be granted.

Dated: Honolulu, Hawaii, September 20, 1991.

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